In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 411

THE UNITED STATES OF AMERICA

v.

JUDGE EUGENE RICE, DISTRICT JUDGE FOR THE EASTERN DISTRICT OF OKLAHOMA

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

MOTION FOR ORDER DIRECTING THAT THE ENTIRE RECORD AND CAUSE BE SENT UP

The United States of America, by the Solicitor General, pursuant to Rule 37, par. 2, moves that the Court order the entire record in this cause to be sent up so that the Court may consider and decide the whole matter in controversy as upon appeal. In support of this motion the United States shows:

1. This proceeding came before the United States Circuit Court of Appeals for the Tenth Circuit on an application by the United States for leave to file a petition for a writ of mandamus directing the Honorable Eugene Rice, Judge of

the United States District Court for the Eastern District of Oklahoma, to vacate a judgment of dismissal and remand entered in the case entitled *In the Matter of the Estate of Peter Micco, deceased,* Civil No. 854, and to hear and determine that cause upon the merits.

2. The *Peter Micco* case is a proceeding to determine the heirs of an enrolled, restricted Indian member of the Five Civilized Tribes who died intestate seized of both restricted and unrestricted property having a value of more than $400,000 and who was survived by restricted Five Tribes Indians claiming to be his heirs. *Merrell* v. *United States,* 140 F. 2d 602 (C. C. A. 10). The case was originally instituted in the County Court of Okfuskee County, Oklahoma. After service of notice of the pendency of the action upon the Superintendent for the Five Civilized Tribes, the United States caused the case to be removed to the United States District Court for the Eastern District of Oklahoma in accordance with the provisions of section 3 of the Act of April 12, 1926, c. 115, 44 Stat. 239.

3. After the case was removed the United States filed a complaint in intervention in its own behalf and on behalf of its restricted Indian wards, heirs apparent of Peter Micco, praying that the court determine the heirs and determine that part of the decedent's property which was restricted. On motion of the administrators the district court on

March 6, 1945, entered an order dismissing the complaint in intervention without prejudice and remanding the proceeding to the County Court of Okfuskee County.

4. On March 10, 1945, the United States filed a notice of appeal from the judgment entered March 6, 1945.

5. On the day the appeal was taken the United States moved in the district court to stay the remand pending determination of the appeal. On March 15, 1945, the district court entered its order overruling the motion to stay the remand but allowing the Government an opportunity to seek relief from the circuit court of appeals. On March 20, 1945, the circuit court of appeals on motion of the United States directed that the judgment of remand be stayed pending further order of that court.

6. On April 28, 1945, the United States filed in the circuit court of appeals an application for leave to file a petition for a writ of mandamus directing the Honorable Eugene Rice, Judge of the United States District Court for the Eastern District of Oklahoma, to vacate the judgment entered March 6, 1945, in the *Peter Micco* case. On May 17, 1945, the respondent answered seeking dismissal of the Government's application on the ground that the order of remand was not reviewable by appeal or by mandamus.

7. The application was heard by the circuit court of appeals *en banc*, four judges sitting. Two questions were presented:

> 1. Whether the circuit court of appeals may by mandamus review the judgment of the United States district court ordering the remand of the *Peter Micco* case to the County Court of Okfuskee County, Oklahoma;
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> 2. Whether the *Peter Micco* case was within the ambit of section 3 of the act of April 12, 1926, c. 115, 44 Stat. 239, so that upon removal pursuant to that section the federal district court had jurisdiction to determine who are the heirs of the intestate and what part of his property is restricted.

8. On September 7, 1945, the circuit court of appeals filed its certificate in this Court. In its certificate the circuit court of appeals stated (pp. 3–4):

> The Judges of this court are equally divided on the question of whether the judgment of remand is reviewable by mandamus and on the question of whether the proceeding was removable under the provisions of the Act of April 12, 1926.
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> Since the judges of this court are equally divided on the two questions presented, we respectfully request the Supreme Court to require the entire record in the cause to be sent up for its consideration and that it decide the whole matter in controversy.

9. While the circuit court of appeals thus specified the two questions in controversy, explained that the judges were equally divided on the two questions, and requested that this Court decide the whole matter, the court certified only one question, namely, the question of reviewability on mandamus.

10. If this Court should answer in the affirmative the single question presented by the certificate, the authority of the circuit court of appeals to review would be sustained. However, the Government would in fact be denied review since the circuit court of appeals already has announced that it is equally divided on the merits of the case, that is, the question respecting the removability of the *Peter Micco* proceeding.

11. Both the question of reviewability and the question of removability are of great importance in the administration of the affairs of the Indians of the Five Civilized Tribes. They are important too because of the effect of the district court decision on land titles in Oklahoma.

The question of reviewability. Section 3 of the Act of April 12, 1926, c. 115, 44 Stat. 239, provides that by serving the Superintendent for the Five Civilized Tribes with a written notice of pendency the interests of the United States can be concluded in cases affecting the land of Indians of the Five Civilized Tribes or the profits, issues, rents and proceeds derived therefrom.

United States v. *Hellard*, 322 U. S. 363, 364. Where notice is served, the United States is given the right to remove the cause to the federal court and is given an opportunity to participate in the case. The prime purpose of section 3 was to settle Oklahoma land titles. Prior to its enactment the United States could not be bound to a proceeding affecting restricted property of Indians of the Five Civilized Tribes. If dissatisfied with the outcome of a proceeding, the United States was free to institute an independent suit and to obtain a fresh decree. *Sunderland* v. *United States*, 266 U. S. 226, 232. So long as the Government could not be sued, litigants could never be certain whether the title to Indian land was merchantable. To cure that situation section 3 was enacted. H. Rep. 322, 69th Cong., 1st sess.; S. Rep. 317, 69th Cong., 1st sess. *Caesar* v. *Burgess*, 103 F. 2d 503, 506 (C. C. A. 10). *House* v. *United States*, 144 F. 2d 555, 559 (C. C. A. 10), certiorari denied, 323 U. S. 781.

In remanding the *Peter Micco* case, the district court held it was without jurisdiction on the ground that an heirship proceeding is not a "suit" within the meaning of section 3. This means that the notice served on the Superintendent was a nullity. It follows that the effect of the decision is to deny the United States the right to participate in the very proceeding in which the identities of the heirs are determined and the property is

ordered distributed. At the same time the decision denies private litigants the right to bind the United States and thus leaves open the way for the institution of a subsequent lawsuit by the United States on the same cause. This is exactly the mischief which section 3 of the Act of 1926 was intended to obviate.

The importance of the question of reviewability becomes apparent when it is considered that the effect of the *Peter Micco* decision is to exclude a large class of cases (an average of 200 per year) from the provisions of section 3 and to bar the United States from obtaining review of orders of remand in other classes of cases arising under section 3.[1] The Government represents the public interest in cases arising under the 1926 Act. Cf. *Heckman* v. *United States*, 224 U. S. 413, 437–438. In the *Peter Micco* case, that interest is expressed in the Government's duty to its restricted Indian wards who are the apparent heirs of the decedent, to participate in the case in order to aid the court in reaching a correct judgment and in order to

[1] Since the enactment of section 3 the Superintendent for the Five Civilized Tribes has been served with about 6,230 notices. Beginning with 1937 notices have been served in an average of over 600 cases each year. Of these an average of about one-third are heirship proceedings such as the *Peter Micco* case. The number of notices served has increased in almost unbroken progression since 1937. 1926–36, inc.—750 notices served; 1937—345; 1938—371; 1939—505; 1940—597; 1941—616; 1942—770; 1943—746; 1944—749; 1945—781 up to November 15, 1945.

insure that the Government's wards receive their share of the inheritance of the restricted property of the decedent and to protect those funds and properties which by law remain restricted when inherited by restricted Indians. In the absence of clear direction by Congress, considerations of public policy require that the Government should not be deprived of review of an order which would conclude such governmental rights. Cf. *United States* v. *American Bell Telephone Co.*, 159 U. S. 548, 554.

The 1926 Act is silent as to review of orders remanding cases removed under that section. In the absence of statutory prohibition orders of remand are reviewable by mandamus. Cf. *Railroad Company* v. *Wiswall*, 23 Wall. 507. The express statutory interdiction against review contained in the general removal act (Judicial Code, sec. 28; 28 U. S. C. sec. 71) does not extend to section 3 of the 1926 Act. The general removal act was not directed at the United States. It was aimed only at private defendants in state courts in support of the general purpose of the statute to contract the jurisdiction of the federal district courts. *In re Pennsylvania Co.*, 137 U. S. 451, 454. Section 3 confers the right of removal exclusively on the United States. Furthermore, it is an independent enactment, confined to Oklahoma, designed for a special purpose relating to the Government's interests in Five Tribes lands and correspondingly limited as to

parties and subject matter. An order remanding a case removed under the general removal act simply returns private litigants to the state court with their respective rights intact. An order such as the one remanding the *Peter Micco* case does more than return the case to the state tribunal. It concludes the rights of the United States to participate in that case since the order is a determination that the cause does not fall within the 1926 Act. Under these circumstances there seems to be no warrant for importing into section 3 the prohibition against review enacted 39 years earlier as a part of the general removal act to remedy a mischief which does not exist under the 1926 Act.

The question of removability. This question similarly is of great importance. Practically all of the lands of Indians of the Five Civilized Tribes lie within the area comprising the Eastern District of Oklahoma and the Northern District of Oklahoma. Since the enactment of the 1926 Act hundreds of notices have been served in proceedings to determine heirs. The United States has caused the removal of a number of those cases, usually involving a large estate where a contest is anticipated. In some cases the jurisdiction of the federal court has been challenged but in all cases, excepting *Peter Micco*, both federal district courts have sustained their jurisdiction. The circuit court of appeals has expressly held proceedings to

probate a will to be within section 3. *Caesar* v. *Burgess*, 103 F. 2d 503 (C. C. A. 10). By implication at least the circuit court of appeals has recognized heirship proceedings to be removable under section 3. *Walker* v. *Spencer*, 123 F. 2d 347, 349 (C. C. A. 10), certiorari denied, 316 U. S. 692. *Scott* v. *Beams*, 122 F. 2d 777 (C. C. A. 10), certiorari denied, 315 U. S. 809. *United States* v. *Anglin and Stevenson*, 145 F. 2d 622 (C. C. A. 10), certiorari denied, 324 U. S. 844. So far as the Government is aware the judgment in the *Peter Micco* case is the sole decision holding the federal court to be without jurisdiction of heirship proceedings removed under section 3.

In reliance on the law established prior to the *Peter Micco* decision, title rights have vested in hundreds of heirship cases and large amounts of money have been distributed. For example, see *Scott* v. *Beams*, 122 F. 2d 777 (C. C. A. 10), certiorari denied, 315 U. S. 809; *United States* v. *Anglin and Stevenson*, 145 F. 2d 622 (C. C. A. 10), certiorari denied, 324 U. S. 844. The stringent construction of section 3 adopted by the district court in the *Peter Micco* case is a departure from settled law. If the decision of the district court stands, the notices served in hundreds of cases would be ineffective to bind the United States and the decrees in those cases would be open to attack. Doubt would be cast on the validity of numerous titles, property rights would

be unsettled and a great deal of litigation probably would ensue. Further, the decision creates a conflict between the two federal district courts dealing with the property rights of deceased Indians of the Five Civilized Tribes since under the law in the Northern District of Oklahoma heirship proceedings are within the scope of section 3. If this Court does not pass upon the question of removability, the decision of the district court on that question will stand affirmed in view of the even division of the judges of the circuit court of appeals. A decision of such far-reaching consequences which interferes with the Government's protective duties to its Indian wards, jeopardizes property rights, and creates conflict with the only other district handling cases of the same nature, should not be left to stand unreviewed.

12. A certified copy of the record in the mandamus proceedings and a certified copy of the record in the *Petit Micco* case are on file in the Clerk's office.

J. HOWARD MCGRATH,
Solicitor General.

DECEMBER, 1945.

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